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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

74-280

ARTHUR T. BRAMBLE, PETITIONER

v.

WILLIAM SAXBE (formerly Elliot Richardson and Richard Kleindienst), Attorney General of the United States of America, and ADMINISTRATOR OF DRUG ENFORCEMENT, DRUG ENFORCEMENT ADMINISTRATION, an Agency of the Department of Justice of the United States of America (formerly John E. Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, an Agency of the Department of Justice of the United States of America),

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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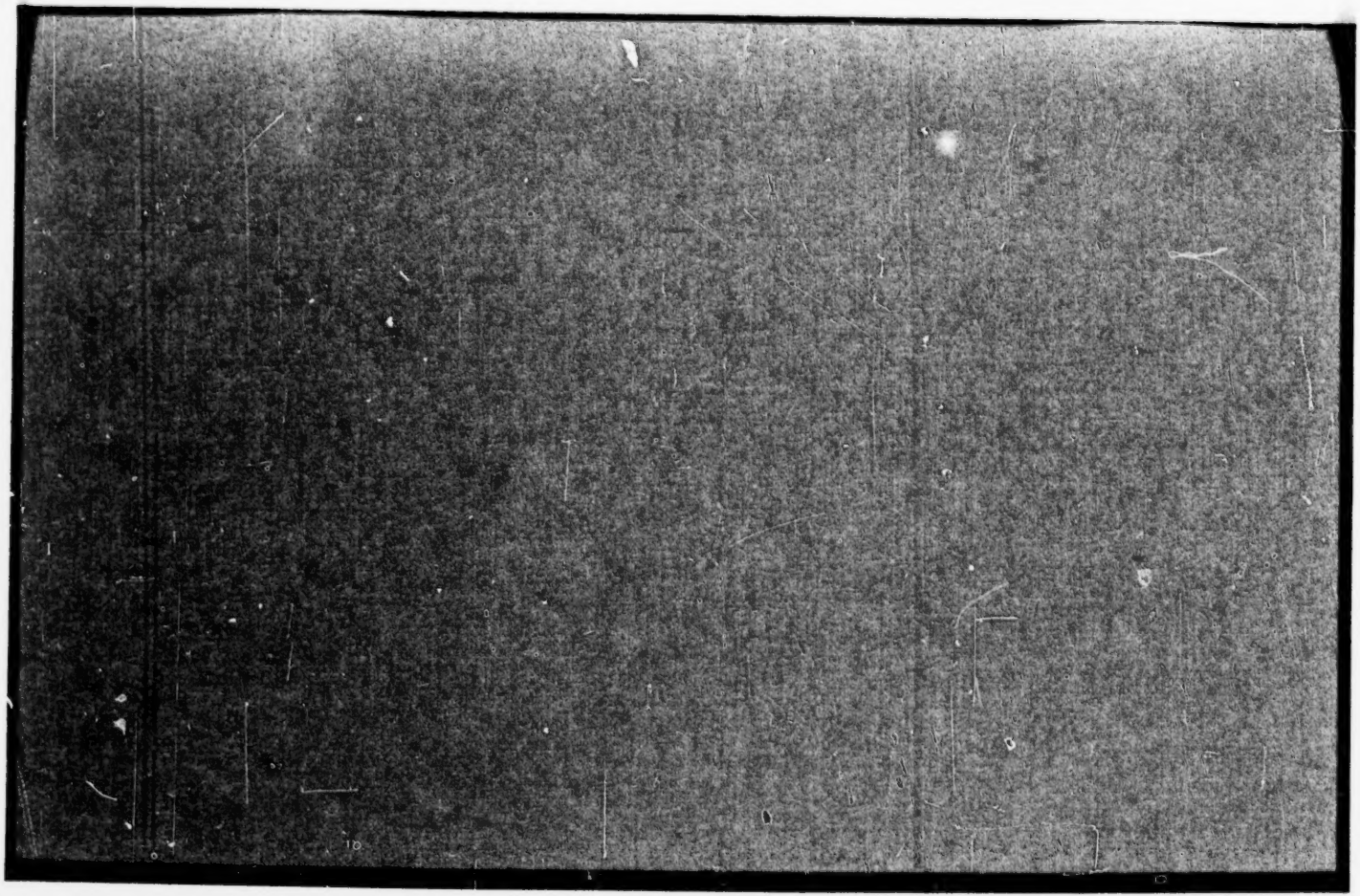


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ARTHUR T. BRAMBLE,

Petitioner,

- vs -

WILLIAM SAXBE (formerly Elliott Richardson and Richard Kleindienst), Attorney General of the United States of America, and ADMINISTRATOR OF DRUG ENFORCEMENT ADMINISTRATION, an Agency of the Department of Justice of the United States of America (formerly John E. Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, an Agency of the Department of Justice of the United States of America.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

REPORTS OF OPINIONS BELOW

The ruling and opinion issued by the United States Court of Appeals for the Tenth Circuit, which forms the basis for

the instant Petition for Writ of Certiorari, is Case No. 73-1500 found in Appendix A hereof. No official or unofficial report of this opinion has, as of this date, been published.

The opinion of the single judge Federal District in this matter is Civil Action No. C-4549 published officially in 357 F.Supp. 1028. This opinion appears *in toto* in Appendix B appended hereto.

The opinion of the three judge Federal District Court in this matter, Case No. 4549 below appears in 357 F.Supp. 1025 and is reproduced in full in Appendix C appended hereto.

GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The judgment and opinion sought to be reviewed in the instant Petition is dated June 17, 1974. No application for rehearing was filed by the Petitioner herein and no application for an extension of time with which to file the instant Petition for Certiorari has been filed by the Petitioner herein.

The Petitioner seeks to invoke this Court's jurisdiction pursuant to the provisions of 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

QUESTIONS PRESENTED FOR REVIEW IN THE INSTANT APPLICATION FOR CERTIORARI

1. Whether or not the forfeiture proceedings provided for in 21 U.S.C. § 881(b)(4) and 21 U.S.C. § 881(d) are criminal in nature and, therefore, whether or not the Tenth Circuit Court of Appeals erred in view of applicable decisions of the United States Supreme Court in holding said forfeiture proceeding to be civil in nature?

2. Whether or not the forfeiture proceedings prescribed by 21 U.S.C. § 881(b)(4) and 21 U.S.C. §881 (d) are void or unconstitutional on their face and as applied to the

Petitioner herein in contravention of the Due Process and Just Compensation Clauses of the Fifth Amendment to the United States Constitution and, therefore, whether or not the Tenth Circuit Court of Appeals erred in view of applicable decisions of the United States Supreme Court in holding said provisions constitutional in the face of the aforesaid Fifth Amendment challenge?

3. Whether or not the Tenth Circuit court of Appeals erred in sanctioning *sub silentio* the dismissal of the instant action by the single judge Federal District Court on *inter alia* the ground that the Petitioner invoked his Fifth Amendment privilege against self incrimination at the taking by the Respondents of his deposition *absent* either a motion by the Respondents or an order from the said single judge Federal District Court compelling discovery, and, therefore, whether or not the Tenth Circuit Court of Appeals' action in such respect has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court, to-wit: those proceedings prescribed by Rule 37(a)(2), *Federal Rules of Civil Procedure*, as to call for the exercise of this Court's powers of supervision and/or correction?

4. Whether or not the Tenth Circuit Court of Appeals erred in sanctioning *sub silentio* the dissolution of the three judge Federal District Court and, by so doing, mandated a significant departure from the accepted and usual course of judicial proceedings prescribed by statute, to-wit: 28 U.S.C. §§ 2282 and 2284 so as to call for this Court's exercise of powers of supervision and correction; further, whether or not the dissolution of the three judge Federal District Court marks a substantial departure from the procedure as followed and accepted in other Federal judicial districts?

THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE INSTANT PETITION FOR CERTIORARI:

Statutory provisions involved in the instant Petition for

Certiorari are: 21 U.S.C. § 881, 19 U.S.C. § 1608, 19 U.S.C. § 1615, C.R.S., 1963, 39-7-401(3) and the Fifth Amendment to the United States Constitution. These provisions are sufficiently lengthy that they are set out verbatim in Appendix D appended hereto.

STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE ABOVE QUESTIONS PRESENTED:

On April 6, 1972, the Petitioner Arthur T. Bramble was arrested by law enforcement officials in and for Boulder County and charged pursuant to the narcotics laws of the State of Colorado with possessing for sale a certain quantity of marijuana. On the date of his arrest, agents of the then Bureau of Narcotics and Dangerous Drugs (now known as the Drug Enforcement Administration) seized Bramble's automobile, a 1969 Volkswagen, on the grounds that said agents had probable cause to believe the Petitioner had used the aforesaid automobile in violation of 21 U.S.C. § 881.

The District Attorney for the applicable State of Colorado jurisdiction deferred the Petitioner's prosecution pursuant to the Colorado narcotic laws for a period of one year, said period ending August 17, 1973.[1]

On August 24, 1973, state charges which had been instituted in April, 1972 against Mr. Bramble were formally dismissed with prejudice (Appendix E). No Federal charges whatsoever arising out of the events of April 6, 1972 were ever instituted against the Petitioner herein.

On or about the 4th day of December, 1972, the Petitioner herein instituted the instant action by filing the Complaint and several Amended Complaints subsequent thereto seek-

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[1]C.R.S., 1963, 39-7-401(3):

"Upon consenting to a deferred prosecution as provided in this section, the defendant shall execute a written waiver of his right to a speedy trial. Consent to a deferred prosecution under this section shall not be construed as an admission of guilt, nor shall such consent be admitted in evidence in a trial for the offense for which he is charged."

ing preliminary and permanent injunctive relief, declaratory judgment and damages. The Petitioner sought to invoke the jurisdiction of the Federal Court pursuant to the provisions of 28 U.S.C. §§ 1343(4), 1346(a)(2), 2201, 2282 and 2284; the United States Constitution, Article I, Section 9, Clause 3; the United States Constitution, Amendments Five and Eight; and Rules 57 and 65, *Federal Rules of Civil Procedure*. The essence of the Petitioner's action as filed was that 21 U.S.C. § 881, in particular (b)(4), (d) and (e) pursuant to which the Petitioner's automobile had been seized and forfeited are void and unconstitutional, both on their face and as applied to the Petitioner herein. Because the Petitioner sought injunctive relief against the enforcement of 21 U.S.C. § 881, he asked for the convening of a three judge Federal District Court. This was accomplished by a minute order issued by the single Federal District Judge, the Honorable Fred M. Winner.

Subsequent thereto, the Respondents herein took the deposition of the Petitioner Bramble. During that deposition, the Petitioner at various times invoked his Fifth Amendment privilege against self incrimination and at various times refused to answer other questions which he in good faith believed were immaterial to the issues he had raised in his lawsuit. The Respondents did not seek an order compelling discovery on either ground.

Thereafter the Respondents filed motions to dismiss pursuant to Rule 12(b) for failure of the Petitioner's Complaint to state a claim and for summary judgment on the grounds that the Federal District Court, whether sitting as a three judge Federal District Court or a single judge Federal District Court lacked jurisdiction

The three judge Federal District Court dissolved itself essentially for a purported want of a substantial federal question (See Appendix C). The case was then remanded to a single judge Federal District Court which dismissed the Petitioner's Complaint by concluding that 21 U.S.C. § 881 was constitutional and for the further reason that the Peti-

tioner had refused to answer certain questions posed to him during his deposition.

Thereafter the Petitioner filed his Notice of Appeal, and perfected an appeal to the United States Court of Appeals for the Tenth Circuit. After due consideration, the Tenth Circuit Court of Appeals affirmed the decision of the single judge Federal District Court on what appeared to be different grounds from those enunciated by the aforesaid single judge Federal District Court (Appendix A).

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

1. THE FORFEITURE PROCEEDINGS PROVIDED FOR IN 21 U.S.C. § 881(b)(4) AND 21 U.S.C. § 881(d) ARE CRIMINAL IN NATURE; THEREFORE, THE TENTH CIRCUIT COURT OF APPEALS ERRED, IN VIEW OF APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, IN HOLDING SAID PROVISIONS TO BE CIVIL IN NATURE.

The opinion by the United States Circuit Court of Appeals for the Tenth Circuit is grounded on the premise that a forfeiture proceeding such as the one involved in the case at bar is civil in nature. The bases for the Court's pronouncement in this respect are the United States Supreme Court's opinions in *Helvering* v. *Mitchell* 303 U.S. 391, 400, n. 3 (1938), and in *United States* v. *Regan*, 232 U.S. 37 (1914).

The purport of both the foregoing authorities attempt to persuade that forfeitures in reality are civil proceedings and not criminal. Accordingly, the lower court argues that the Petitioner herein does not stand to secure the due process guarantee of the Fifth Amendment commanding *inter alia* that no "person . . .shall . . . be deprived of . . . property without due process of law."

In a criminal proceeding, it is now clear that encompassed within the Fifth Amendment Due Process Clause is the re-

quirement that facts shall in the commission of acts proscribed by a criminal statute must be proved beyond a reasonable doubt. In giving the proof beyond a reasonable doubt standard constitutional stature, the United States Supreme Court in *In Re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970) declared:

> "These rules (standard of proof beyond a reasonable doubt) are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property . . .
>
> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 25 L.Ed.2d., 373, 375

In the instant case, it is not disputed that the Petitioner's automobile was seized and forfeited pursuant to 21 U.S.C. §881(b)(4) permitting the Attorney General and/or his agents to summarily cause such forfeiture based upon his or their probable cause to believe such automobile had been used in violation of the narcotics offenses set forth in 21 U.S.C. § 801, *et seq.*

It cannot be gainsaid that the foregoing 21 U.S.C. § 801, *et seq.*, including § 881(b)(4), viewed in its entirety is a criminal, penal statute. Accordingly, the forfeiture provisions must be so viewed and have been so viewed. In *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 28 L.Ed.2d. 434 (1971), this Court held that forfeiture statutes when viewed in their entirety "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise". 401 U.S. 715, 722. Later, this Court in *Calero-Toledo* v. *Pearson-Yacht Leasing Company*, —— U.S. ——, 40 L.Ed.2d. 452 (1974) considered the Puerto

Rican forfeiture statute, which the Court described as "[B]ut for unimportant differences . . . modeled after 21 U.S.C. § 881 . . ." 40 L.Ed.2d. 452, 470, n. 25. The Court then proceeded to specify that the Puerto Rican forfeiture statutes (modeled after the forfeiture statute directly questioned in the instant case):

> "Further . . . punitive and deterrent purposes . . . Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws *fosters the purposes served by the underlying criminal statutes,* both by preventing further illicit use of the conveyance and by impairing an economic penalty, thereby rendering illegal behavior unprofitable." 40 L. Ed.2d. 452, 470. [Emphasis supplied]

In *Calero-Toledo, supra,* the Court went on to find, evidently pursuant to stipulation of the parties, that the yacht which had been forfeited in Puerto Rico as a result of a violation of its forfeiture statute modeled after 21 U.S.C. § 881, was *in fact* used in violation of those laws. Accordingly, the Court held that the innocent owner of the yacht was not protected by the Fifth Amendment Just Compensation Clause.

Both *U.S. Coin & Currency, supra,* and *Calero-Toledo, supra,* affirm the earlier definitive pronouncement by this Court that a forfeiture proceeding is indeed criminal in nature and effect. In fact such pronouncement was indispensable to the explicit holding of this Court in *U.S. Coin & Currency, supra.*

The early leading decision in the foregoing respect is *Boyd v. U.S.,* 116 U.S. 616 (1896), which incidently was expressly relied upon by the Court in *U.S.* v. *Coin & Currency, supra.* In Boyd, the United States Supreme Court said:

> "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, *though they may be civil in form are in their nature criminal.*" [Emphasis supplied] 116 U.S. 634

Thus, the Tenth Circuit in attempting to characterize the forfeiture proceeding in the instant case as civil has clearly run afoul of the previous decisions of the United States Supreme Court, most dramatically in *U.S.* v. *U.S. Coin & Currency, supra; Boyd* v. *U.S., supra,* and *Calero-Toledo* v. *Pearson Yacht Leasing Company, supra.*

The Tenth Circuit's ruling and decision in the instant case below is therefore in direct conflict with the recent persuasive applicable decisions of the United States Supreme Court. For this reason alone, compelling and important grounds exist for the issuance of the Writ of Certiorari to the Tenth Circuit pursuant to Rule 19(1)(b) *Rules of the Supreme Court of the United States.* That Rule indicates that one type of reason governing the issuance of the Writ is that a United States Court of Appeals "has settled a federal question in a way in conflict with applicable decisions of this Court . . ." Rule 19(1)(b) *Rules of the Supreme Court of the United States.* Consequently, *United States* v. *Regan,* 232 U.S. 37, heavily relied upon by the Tenth Circuit below is itself inconsistent with the present thinking of the United States Supreme Court relative to forfeiture statutes whose underpinning is a criminal violation.

2. THE FORFEITURE PROCEEDINGS PRESCRIBED BY 21 U.S.C. § 881(b)(4) and 21 U.S.C. § 881(d) ARE VOID AND UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO THE PETITIONER HEREIN IN CONTRAVENTION OF THE DUE PROCESS AND JUST COMPENSATION CLAUSES OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THEREFORE, THE TENTH CIRCUIT COURT OF APPEALS HAS ERRED. IN VIEW OF APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, IN HOLDING SAID PROVISIONS CONSTITUTIONAL IN VIEW OF THE CONSTITUTIONAL CHALLENGE; FURTHER, THE CALERO-TOLEDO DECISION LEAVES

UNRESOLVED THE QUESTION POSED BY THIS PETITION.

The impact of the *Calero-Toledo* decision, *supra*, in Part III of the Opinion upon the merits of the Petitioner's claim herein is significant. In *Calero-Toledo, supra*, it was stipulated by the parties that the means of conveyance, to-wit, a yacht, had been criminally used in violation of the Puero Rican narcotics laws. Accordingly, the Court held in such as the language above cited that the yacht was a proper subject of forfeiture inasmuch as such forfeiture would further the "punitive and deterrent" purposes of the Puerto Rican narcotics laws. The Court so held, notwithstanding the fact that the owner of the yacht, a lessor, was himself totally innocent of criminal wrongdoing.

In the instant case, the Petitioner has conceded *arguendo* only the existence of probable cause for the Attorney General and/or his agents under 21 U.S.C. § 881(b)(4) to believe that the said Petitioner's automobile was used in violation of the Federal narcotics laws. As the record stands, this is the extent to which, under the authority of 21 U.S.C. § 881(b)(4) the government has a claim against the Petitioner's automobile.

Therefore, the factual situation in the case at bar stands clearly within the ambit of those unconstitutional means exposed by the Supreme Court in *Boyd* v. *U.S., supra*, and *U.S.* v. *U.S. Coin & Currency, supra*, whereby the exaction of criminal type penalties was sought through civil type process. In *Boyd, supra*, the Court instructively reasoned as follows:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants — that is, civil in form — can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot

be. *Information (libel in forfeiture) though technically a civil proceeding is in substance and effect a criminal one.*" 116 U.S. 616, 634. [Emphasis supplied]

In *U.S.* v. *U.S. Coin &Currency, supra,* the government filed a libel against currency, notwithstanding the fact that the owner of the currency, one Donald Angelini, was himself immune by the Fifth Amendment Self Incrimination Clause from criminal process. The government's theory in so instituting the libel against the currency was that the forfeiture proceeding was a civil action.

However, as above noted, the Supreme Court in *U.S.* v. *U.S. Coin & Currency, supra,* held and restated in *Calero-Toledo, supra,* that forfeiture statutes are indeed designed to punish significant criminal wrongdoing. That being the unarguable case, it is clear that a forfeiture provision predicated upon a penal statute cannot stand, if, on its face, or as applied, it permits the exaction of a criminal penalty pursuant to less than the due process safeguards afforded in criminal cases. *In Re Winship, supra. A fortiori,* someone such as the Petitioner herein cannot be allowed to suffer a criminal penalty, to-wit, the deprivation of his personal property based only upon a government official's probable cause to believe that he used that property in violation of the law.

Therefore, what obtains in the instant case, and what the Tenth Circuit Court of Appeals has sanctioned is the government's seizing and causing to be forfeited this Petitioner's automobile based only upon the Attorney General and/or his agents' probable cause to believe that said automobile had been used in violation of the federal narcotics laws. Inasmuch as the forfeiture proceeding prescribed by 21 U.S.C. § 881(b)(4) and 21 U.S.C. § 881(d) is clearly criminal in nature and effect, *Boyd* v. *U.S., supra; U.S.* v. *U.S. Coin & Currency, supra; Calero-Toledo* v. *Pearson Yacht Leasing Co., supra,* the Petitioner herein has been deprived of his property based upon a standard of proof significantly less than what is required by the Fifth Amend-

ment Due Process Clause. This is the clear and indisputable import of this Court's decision in *In Re Winship, supra,* and the pertinent language from that decision quoted hereinabove.

Indeed, in the instant case, the government has used the civil form of the Supplemental Rules of Federal Civil Procedure governing the enforcement provisions of the Customs Laws to effect a criminal penalty against the Petitioner. On its face, 21 U.S.C. § 881(b)(4) and § 881(d) sanction this proceeding. This is manifest inasmuch as had the Petitioner, upon the seizure of his automobile pursuant to 21 U.S.C. § 881(b)(4), posted the bond required by the conjunctive provisions of 21 U.S.C. § 881(d) and 19 U.S.C. § 1608, the government would have been obliged to institute a judicial forfeiture proceeding against the automobile owned by the Petitioner. In such a judicial forfeiture proceeding conducted pursuant to 19 U.S.C. § 1615, and pursuant to the standards prescribed in 21 U.S.C. § 881(b)(4), the government would have had only to prove by a preponderance of the evidence that probable cause existed to believe that the Petitioner's automobile had been used in violation of the Federal narcotics laws.

Upon such a showing, the burden under 19 U.S.C. § 1615, would have been thrust upon the Petitioner to prove that his automobile was not illegally so used. However, under the explicit holding of this Court in *U.S.* v. *U.S. Coin & Currency, supra,* the Petitioner in such a judicial forfeiture proceeding under 19 U.S.C. § 1615 would have been entitled to and would in fact in this case have invoked his Fifth Amendment privilege against self incrimination. Thus, the result of such a judicial forfeiture proceeding under the present state of the law as incorrectly enunciated by the Tenth Circuit in the case below, would have been to have caused the Petitioner herein to suffer a criminal penalty pursuant to civil process and, most importantly, pursuant to even less than the burden of proof in a civil case.[2] This is absolutely unlawful and unconstitutional under the authority

of *Boyd* v. *U.S., supra; U.S.* v. *U.S. Coin & Currency, supra; Calero-Toledo* v. *Pearson Yacht Leasing Co., supra,* and *In Re Winship, supra.*

Accordingly, the opinion by the United States Court of Appeals for the Tenth Circuit has mandated and sanctioned the deprivation of the property of the Petitioner herein, an innocent man, pursuant to a statute which authorizes that deprivation based only upon probable cause to believe that property was used in violation of the Federal narcotics laws. The Tenth Circuit's so ruling and so sanctioning marks a clear departure from recent and persuasive decisions of this Court both as pertain to the nature of forfeiture proceedings and as pertain to the operation of penal forfeiture statutes which on their face prescribe the taking of property based only upon probable cause to believe that property was used in violation of penalty forfeiture statutes.

In *Almeida-Sanchez* v. *U.S.*, 413 U.S. 266 (1974), the United States Supreme Court held that no statute can justify an otherwise unconstitutional search in contravention of the Fourth Amendment. It stands with equal vigor that no statute can justify a deprivation of property without due process of law in contravention of the Fifth Amendment to the United States Constitution. This is clearly what has happened in this case, where an innocent man whose property has not been shown to have been used, except by probable cause, conceded *arguendo,* in violation of the federal narcotics laws has, nevertheless, been deprived of that property. This situation must be corrected. *In Re Winship, supra.*

3. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN SANCTIONING *SUB SILENTIO*

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[2]The government's proof under 21 U.S.C. § 881(b)(4) and (d) by a preponderance of the evidence that probable cause exists seems roughly akin to the quaility and quantum of proof needed by a plaintiff to survive a directed verdict motion in a civil action. This is hardly what the Supreme Court can be said to have envisioned for criminal proceedings under the unmistakable doctrine of *In Re Winship, supra.*

THE DISMISSAL OF THE INSTANT ACTION BY THE SINGLE JUDGE FEDERAL DISTRICT COURT ON *INTER ALIA* THE GROUND THAT THE PETITIONER HEREIN INVOKED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION IN THE TAKING BY THE RESPONDENTS OF HIS DEPOSITION ABSENT A MOTION BY SAID RESPONDENTS FOR AN ORDER COMPELLING DISCOVERY OR THE ISSUANCE OF AN ORDER BY THE COURT COMPELLING DISCOVERY, AND, THEREFORE, THE TENTH CIRCUIT COURT OF APPEALS' ACTION IN THIS RESPECT HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY A LOWER COURT, TO-WIT, THOSE PROCEEDINGS PRESCRIBED BY RULE 37(a)(2) FEDERAL RULES OF CIVIL PROCEDURE. THIS CALLS FOR THE EXERCISE OF THIS COURT'S POWERS OF SUPERVISION AND/OR CORRECTION.

The single judge Federal District Court ordered the action filed by the Petitioner herein dismissed for a second reason that the Petitioner herein invoked *inter alia*, his Fifth Amendment privilege against self incrimination. The rationale of the Court in this respect was that the Petitioner could not use the Fifth Amendment as both a "sword and a shield" in a civil action.

The Petitioner's invocation of the privilege occurred during a deposition taken of him by the Respondents pursuant to notice (Record on Appeal, Vol. V, Page 2). The Petitioner also refused to answer certain other questions based on the good faith belief that they were irrelevant to the lawsuit, even under the broad latitude afforded by Rule 26, *Federal Rules of Civil Procedure.*

Sometime subsequent thereto the Respondents filed *inter alia* a motion denominated "Motion for Sanctions for Failure to Make Discovery" (Record on Appeal, Vol. III, Page 38).

The prayer clause of such Motion filed by the Respondents asked for an order compelling the Petitioner to answer the questions put to him, or, in the alternative, for various relief as specified in Rule 37(b)(2), *Federal Rules of Civil Procedure* (Record on Appeal, Vol. III, Page 40). The Respondents also asked for their deposition costs.

It is clear from the record, that whatever the nature of the Respondents' motion in this respect, the lower court never did enter an order compelling the Petitioner to answer the questions put to him at his deposition. This is an absolute prerequisite under Rule 37(a)(2) to the imposition of sanction of any kind, which sanctions are set forth in Rule 37(b)(2) and do indeed include, among other things, the dismissal of a lawsuit. Therefore, the Petitioner did not fail to comply with any order of the Court compelling discovery which might warrant the imposition of such sanctions, including the dismissal of his lawsuit.

A fortiori, inasmuch as there had been no motion under Rule 37(a)(2) to compel discovery and inasmuch as no order had been forthcoming, there can under the Rules be no award of expenses pursuant to Rule 37(a)(4), *Federal Rules of Civil Procedure*. It is well to note that Rule 37(a)(4) specifies that the party against whom the cause here sought is to be given an opportunity to respond and present evidence or argument that his refusal to comply with an order was substantially justified. Again, however, it must be remembered that no order compelling discovery was either moved by the Respondents or forthcoming from the Court.

Therefore, the single judge Federal District Court's imposition of the sanction of dismissal for failure of the Petitioner herein to answer questions posed to him during his deposition clearly marks a departure from the usual course of accepted judicial proceeding. This departure by itself warrants correction by this Court under its general powers of supervision in order to insure that lower Federal Courts will not again so deviate from accepted practice, practice

which is grounded in fundamental concepts of procedural due process.

4. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN SANCTIONING *SUB SILENTIO* THE DISSOLUTION OF THE THREE JUDGE FEDERAL DISTRICT COURT AND BY SO DOING HAS MANDATED A SIGNIFICANT DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS PRESCRIBED BY STATUTE, TO-WIT, 28 U.S.C. § 2282 SO AS TO CALL FOR THIS COURT'S EXERCISE OF POWERS OF SUPERVISION AND CORRECTION; FURTHER, THE DISSOLUTION OF THE THREE JUDGE FEDERAL DISTRICT COURT MARKS A SUBSTANTIAL DEPARTURE FROM THE PROCEDURE AS FOLLOWED AND ACCEPTED IN OTHER FEDERAL JUDICIAL CIRCUITS.

The decisive authority in the foregoing respects is the United States Supreme Court's opinion in *Goosby* v. *Osser*, —— U.S. ——, 35 L.Ed.2d. 36 (1973) wherein certain inmates in Pennsylvania brought a class action challenging certain statutory provisions which precluded them from attaining bail and thereby further precluding them from exercising their rights of suffrage. The defendants in the action who were charged with enforcing the attacked provisions were both state and municipal officials.

The State of Pennsylvania officials conceded that the challenged statutory provisions were unconstitutional. Nevertheless, the municipal officials did not so concede and in fact contended the challenged provisions were constitutional. However, because of the concessions on the part of the state officials, the single judge Federal District Court dismissed the Complaint for lack of a case in controversy as required by Article III of the United States Constitution and the Declaratory Judgment Act.

Pursuant to this dismissal, the plaintiffs in *Goosby* ap-

pealed. The Third Circuit affirmed the dismissal of the Complaint. However, the Third Circuit did so on the basis of the constitutional claims being insubstantial and thus did not warrant the convening of a three judge Federal Court.

On appeal to the United States Supreme Court the decisions of both lower courts were reversed. Important for purposes of the instant case the Supreme Court held the ruling of the Third Circuit erroneous in its characterization of the petitioner's constitutional claim as "insubstantial". In this respect the United States Supreme Court reasoned that constitutionally, insubstantial must be equated with such concepts as "essentially fictitious", "wholley insubstantial", and "obviously without merit".

This Court in *Goosby* then argued that the limiting adverbs "essentially", "wholly", and "obviously" have "cogent legal significance". In this respect, the Court thus reasoned that in light of its prior decisions, a claim was constitutionally insignificant:

> "Only if prior decisions inescapably render the claims frivolous . . . A claim is insubstantial only if its unsoundness so clearly results in the previous decisions of this Court as to foreclose the subject and leave no room for inference that the questions sought to be raised can be the subject of controversy." 35 L.Ed.2d. 36, 42 (Citing *ex parte Poresky*, 290 U.S. 30, 78 L.Ed. 2d 452 [1933])

The mere fact that contemporaneous with the filing of the instant lawsuit resulting in this Petition, at least two other lawsuits were pending and have reached the United States Supreme Court via the three judge Federal District Court statutes renders the three judge Federal District Court's dissolution of itself erroneous. First, as stated, this Court heard a direct appeal from a three judge Federal District Court which held unconstitutional the Puerto Rican forfeiture statute. *Calero-Toledo* v. *Pearson Yacht Leasing Company, supra.* The statutory basis for the convening of

the three judge Federal District Court in *Calro-Toledo* was 28 U.S.C. § 2283. By virtue of the three judge Federal District Court's ruling, this Court was obligated under 28 U.S.C. § 1253 to 28 U.S.C. § 1253.

Further, the First Circuit Court of Appeals in *Melendez* v. *Schultz*, 486 F.2d. 1032 (1st Cir. 1973) held that the United States Attorney could not appeal directly to the First Circuit Court of Appeals from an adverse ruling of a three judge Federal District Court where the three judge court had been properly convened. The Court of Appeals for the First Circuit held that inasmuch as the Plaintiffs in *Melendez* sought injunctive and declaratory relief against the enforcement of a certain Federal statute, to-wit, 49 U.S.C. § 782, et seq. on the grounds, *inter alia*, that it violated the Fourth Amendment to the United States Constitution, a three judge Federal District Court was mandated by 28 U.S.C. § 2282. This is the exact analogous procedural situation in the instant Petition. The First Circuit further reasoned inasmuch as the three judge Court ruled the aforesaid Federal provision unconstitutional in face of the Fourth Amendment, the government was obliged to lodge a direct appeal under 28 U.S.C. § 1253 with the United States Supreme Court. Similar rulings have been issued by the Second and Fifth Circuits in *Rosenthal* v. *Board of Education of Central High School District No. 3*, 497 F.2d. 726 (2nd Cir. 1974), and *Sands, et al*, vs. *Wainwright, et al.*, 491 F.2d. 417 (5th Cir. 1973), respectively. Both the *Rosenthal* and *Sands* decisions, *supra*, relied upon this Court's ruling in *Goosby* v. *Osser, supra.*

In the instant case, a forfeiture statute has been attacked as being violative of *inter alia*, the Fifth Amendment Due Process Clause. The precise grounds of the attack are not only substantial, they are unique. They have not been raised in the precise form and substance in any previous decision including *Calero-Toledo, supra* and *Melendez* v. *Schultz, supra.* It is, therefore, clear under the rationale of *Goosby* v. *Osser, supra*, that the claim presented in this Petition and in the lawsuit which preceded it is indeed constitutionally sub-

stantial. Its result has not been foreclosed by prior decisions of this Court. *Goosby* v. *Osser, supra.*

Accordingly, the Tenth Circuit, in *sub silentio* sanctioning the three judge Federal District Court's dissolving itself, has thereby approved a blatant departure from accepted judicial procedure mandated by 28 U.S.C. § 2282 and 28 U.S.C. § 2284. Further, the Tenth Circuit's so sanctioning lies in direct conflict with the ruling of the First Circuit Court of Appeals decisions in both *Calero-Toledo, supra* and *Melendez* v. *Schultz, supra.*

CONCLUSION

For the reasons above stated, a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit pursuant to the criteria set forth in Rule 19(1)(d), *Rules of the Supreme Court of the United States.* In this case, the Tenth Circuit has decided basic Federal questions in a way altogether conflicting with applicable decisions in this Court. Furthermore, the Tenth Circuit has sanctioned procedures and decision by the Federal District Court which have departed from the accepted and usual course of judicial proceedings.

Respectfully submitted:

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APPENDICES

A. Opinion of the United States Court of Appeals for the Tenth Circuit

B. Opinion of the single judge Federal District Court for the District of Colorado

C. Opinion of the three judge Federal District Court for the District of Colorado

D. Constitutional and statutory provisions:

1. Fifth Amendment to the United States Constitution
2. 21 U.S.C. § 881
3. 19 U.S.C. § 1608
4. 19 U.S.C. § 1615
5. *Colorado Revised Statutes*, 1963, 39-7-401(3)

E. Order of County Court in and for the County of Boulder, State of Colorado deferring state criminal prosecution against Petitioner Bramble.

F. Order of the County Court in and for the County of Boulder, State of Colorado dismissing with prejudice the criminal prosecution against Petitioner Bramble.

APPENDIX A

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

ARTHUR T. BRAMBLE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
- vs -	)	No.
	)	73-1500
ELLIOTT RICHARDSON, Attorney General of the United States of America (formerly Richard Kleindienst), and JOHN E. INGERSOLL, Director of the Bureau of Narcotics and Dangerous Drugs, an Agency of the Department of Justice of the United States of America,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(C 4549)

John H. Bisbee, Bisbee, Geil & Kezer, Boulder, Colorado for Appellant.

Pepe J. Mendez, Assistant United States Attorney (James L. Treece, United States Attorney, with him on the brief) Denver, Colorado, for Appellees.

Before LEWIS, Chief Judge; JONES* and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

On April 6, 1972 Arthur T. Bramble was arrested by Colorado law enforcement officials and was charged pursuant to the narcotics laws of the state of Colorado with possessing for sale a quantity of marijuana. On the date of the arrest agents of the Bureau of Narcotics and Dangerous Drugs seized Bramble's car, a 1969 Volkswagen, on grounds that it had been used in violation of 21 U.S.C. § 881.[1]

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.
>
> . . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) . . . .
>
> (b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued . . . except that seizure without such process may be made when —
>
> . . . .
>
> (4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

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*Of the Fifth Circuit, sitting by designation.

[1]21 U.S.C. § 881 — Forfeitures — Property subject

The District Attorney for the Twentieth Judicial District for the State of Colorado deferred Bramble's state prosecution for a period of one year running to August 17, 1973. Bramble has successfully completed the one-year probationary period and the charges against him have been dismissed. No federal charges arising out of the events of April 6, 1972 were ever instituted.

21 U.S.C. § 881(d) provides that forfeiture proceedings are to be governed by the provisions for seizure, summary and judicial forfeiture. and condemnation of property which apply for violations of the customs laws. 19 U.S.C. §§ 1608 and 1609 of those customs laws require that a person claiming a seized vehicle which is evaluated at less than $2500 must file a claim to the property and post a penal bond of $250 within 20 days after the government has posted its notice of intention to forfeit. Failure to do so will result in the summary forfeiture of the vehicle to the government.

If the claim is filed and the bond posted within the required time, the claim is then transmited to the United States attorney for the district in which seizure was made for the institution of judicial forfeiture proceedings. If the value of the vehicle exceeds $2500 no summary forfeiture is permitted and the United States attorney must initiate judicial proceedings. 19 U.S.C. § 1610. At such forfeiture proceedings the burden of proof falls upon the claimant to the vehicle provided the government first establishes probable cause for the institution of the action. 19 U.S.C. § 1615.

Bramble's Volkswagen, valued at less than $2500, was summarily forfeited when Bramble failed to file the requisite claim or post the $250 bond within the 20-day time period. He did petition the Director of the Bureau of Narcotics and Dangerous Drugs for remission or mitigation of the forfeiture but that petition was denied as was a subsequent petition for reconsideration.

Bramble then filed a complaint in the United States District Court for the District of Colorado seeking a declaratory judgment that the forfeiture statute was unconstitutional on

its face and seeking injunctive relief against its enforcement. A three-judge court was convened and subsequently dissolved after it concluded that the forfeiture statute was constitutional and that Bramble's complaint failed to raise a substantial federal question. It was ordered that the case be presented to a single district judge. Bramble v. Kleindeinst, D. C. Colo., 357 F, Supp. 1025.

The case was subsequently submited to a single district judge as an action for declaratory judgment, temporary injunction, permanent injunction and damages. Numerous jurisdictional bases were alleged, the court below noting jurisditction under 28 U.S.C. § 1346(a)(2), which permits civil actions against the United States in amounts not exceeding $10,000 when the cause of action is founded either upon the constitution or an act of Congress. The court first held that the denial of Bramble's petition for mitigation was an unreviewable action lying exclusively within administrative discretion. It then dismissed Bramble's complaint after concluding that the challenged forfeiture statute was constitutional and that dismissal was an appropriate sanction for Bramble's refusal to answer certain questions posed to him during deposition. The court reasoned that Bramble could not, as plaintiff in a civil suit, use his fifth amendment right against self-incrimination as both a "sword and a shield." Bramble v. Kleindeinst, D. C. Colo., 357 F. Supp. 1028. Bramble now appeals, challenging both the dissolution of the three-judge panel and the dismissal of his complaint by the single district judge below.

Whether our consideration here is seen as a review of the three-judge dissolution or the dismissal of the complaint before the single district judge, it is clear that the success of this appeal must be measured by the constitutionality of the statutory scheme under which Bramble's car was forfeited. Bramble makes a sweeping attack on this scheme, but the essence of his argument is that the forfeiture proceeding is in reality a criminal action and that to take his car without establishing *beyond a reasonable doubt* that a criminal viola-

tion has occurred violates the due process clause of the fifth amendment.[2] In Re Winship, 397 U.S. 358. He argues that the recent Supreme Court decision in United States v. United States Coin & Currency., 401 U.S. 715, challenges the long-established rule that forfeiture proceedings are essentially civil, rather than criminal, actions.

The peculiar nature of forfeiture statutes in general has given rise to numerous constitutional attacks. Claimants whose property has been subject to forefeiture have consistently argued that forfeiture actions are essentially criminal and must be governed by all of the rules which adhere to criminal prosecutions. This argument has enjoyed only qualified success.

In Boyd v. United States, 116 U.S. 616, the Supreme Court faced the question of whether the compulsory production of a man's private papers for evidentiary use against him in a proceeding to forfeit his property for alleged fraud against the revenue laws constituted an unreasonable search and seizure within the meaning of the fourth amendment. The procedure was also atacked on the grounds that it violated the fifth amendment right against self-incrimination. The Court, in ruling for the claimant, stated:

> As therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution,

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[2]It should be noted at this time that Bramble's conception of the forfeiture proceedings is not entirely accurate. He states in his brief that he did not file a claim or post a penal bond because to do so would have been a futile gesture in that his car would have been forfeited upon a government showing of probable cause. In fact, the burden merely shifts to the claimant once probable cause has been established. His rights are not foreclosed as Bramble's argument suggests. He merely must prove by a preponderance of the evidence that his car was not being used in violation of the drug laws. 19 U.S.C. § 1615. For the purposes of this appeal, Bramble has conceded the existence of probable cause.

> and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . . Boyd, *supra*, at 634.

In Coffey v. United States, 116 U.S. 436, the forfeiture claimant was again successful when the Court held that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. The *Coffey* holding has subsequently been distinguished nearly to extinction. The Supreme Court held in a recent decision that a forfeiture proceeding is not barred by an acquittal in a criminal case in which the government was bond to establish the element of criminal intent if the forfeiture proceeding does not impose a similar burden on the government. "Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235.

The erosion of the *Coffey* rule symbolizes the success which forfeiture statutes have generally enjoyed and the liberal construction they have received. Various forfeiture proceedings have been consistently upheld, even under the most seemingly inequitable circumstances. Thus, in United States v. One Ford Coupe Automobile, 272 U.S. 321, an automobile was forfeited because it was being used to defraud the United States of the tax on distilled spirits in violation of Rev. Statutes § 3450. The owner of the car, innocent of any criminal wrongdoing himself, was nevertheless deprived of his property because "under §3450 the vehicle is the offender and must be forfeited if there is a guilty intent on the part of him who used it. . . ." 272 U.S. at 332. This decision characterizes the fiction that forfeiture proceedings are *in rem* actions against offending inanimate objects.

Helvering v. *Mitchell*, 303 U.S. 391, attmepted to establish a definitive guideline for making the civil-criminal distinction in civil penalty and forfeiture proceedings. The issue

there was whether the assessment of a tax deficiency under the Revenue Act of 1928 for fraud with intent to evade a tax was barred by the acquittal of the defendant on an indictment under the same act for a willful attempt to evade and defeat the tax. In response to the argument that institution of the forfeiture action subjected the defendant to double jeopardy, the Court stated:

> Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether § 293(b) imposes a criminal sanction. That question is one of statutory construction. 303 U.S. at 399.

The *Helvering* Court proceeded to characterize the civil-criminal problem as one of determining whether the sanction imposed is remedial or punitive and concluded that the tax deficiency assessment was essentially remedial. The double jeopardy argument was therefore deemed inapplicable.

Unfortunately, an analysis of the cases both ante-dating and succeeding *Helvering* convinces us that the civil-criminal distinction, whether characterized as remedial-penal or otherwise, is indeed an elusive one. We are convinced that the type of forfeiture statute or penalty involved is not the determinative factor and are inclined to agree with the reasoning of Mr. Justice Brandeis, expressed in a footnote in his *Helvering* opinion:

> The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the sanction being enforced. 303 U.S. at 400, n.3.

The case law offers solid support for this proposition. In United States v. Regan, 232 U.S. 37, a $1000 penalty imposed for violation of the immigration laws was characterized a civil suit in debt and it was held that the government did not need to prove its case beyond a reasonable doubt. So also in Hepner v. United States, 213 U.S. 103, a monetary penalty imposed for violation of the immigration laws was deemed a civil action in which the rules of civil procedure applied generally and the government was held to be entitled to a directed verdict.

On the other hand, the Court has approached the issue differently when dealing with cases where certain fundamental fourth and fifth amendment rights have been at stake. Boyd v. United States, *supra*, concerned the right against self-incrimination and the right against unreasonable searches and seizures. The Court took pains to make this distinction clear when it narrowly held that the proceeding was criminal "for all the purposes of the Fourth Amend- of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ." 116 U.S. at 634.

In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, the issue was whether evidence illegally seized in violation of the fourth amendment could be used in a state forfeiture proceeding. The Court, in ruling that the evidence was inadmissible, again demonstrated its willingness to stress the criminal aspect of a forfeiture proceeding where a vital fourth amendment right was at stake "Finally, as Mr. Justice Bradley aptly pointed out in *Boyd*, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 U.S. at 700.

When viewed in light of Mr. Justice Brandeis' rationale it is apparent that *United States Coin & Currency* marks no real departure from previously-settled law. That case concerned the validity of a forfeiture action conducted pursuant

to a federal statute which provided that it was unlawful to possess any property intended for use in violating the internal revenue laws. The relevant revenue law was one which required individuals to register as gamblers and pay related gambling taxes, and the Court had already precluded the criminal conviction of gamblers who properly assert their privilege against self-incrimination as a ground for noncompliance with these aspects of the tax law in Grosso v. United States, 390 U.S. 62, and Marchetti v. United States, 390 U.S. 39. In holding that the forfeiture proceeding was invalid the Court was essentially stating only that the civil penalty could not be imposed in a manner inconsistent with the fifth amendment right against self-incrimination.

We therefore do not read *United States Coin & Currency* as signaling an end to the characterization of forfeiture actions as essentially civil proceedings. We recognize that the statutory scheme in this case is analogous to that under consideration in *United States Coin & Currency*, for both permit an innocent owner to recover the seized property upon establishing under 19 U.S.C. § 1618 that "the forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . ." But Mr. Justice Harlan's point that such forfeiture statutes when viewed in their entirety are thus "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise," 401 U.S. At 721-722, is not a new one. In United States v. Regan, *supra*, the Court, in facing the precise issue presented here by Bramble, clearly acknowledged that the $1000 penalty in question was a sanction imposed purely for the commission of a public offense. Yet the Court concluded that the action was civil and that the reasonable doubt standard did not apply.

What *Coffey, Boyd, One Plymouth Sedan*, and *United States Coin & Currency* do indicate is that the civil nature of forfeiture proceedings will not be permitted to provide an avenue through which the fundamental rights of protection against unreasonable searches and seizures and self-

incrimination can be frustrated. A close reading of those cases simply does not justify the inference that they were intended to transform forfeiture proceedings into criminal actions for all procedural purposes. The absence of the reasonable doubt standard in the challenged forfeiture process does not result in a denial of due process.

Although not argued to us specifically, we have entertained doubt as to the potential impact that Fuentes v. Shevin, 407 U.S. 67, might have upon the basic constitutionality of the summary seizure and forfeiture procedures which we here consider. This aspect of the case would appear to be dissolved by the decision of the Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., No. 73-157, dec. May 15, 1974, in which the limitations of *Fuentes* exclude any compulsion of relief to Bramble.

We have carefully considered Bramble's remaining constitutional contentions and find them to be without merit.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

ARTHUR T. BRAMBLE,	)	
	)	
Plaintiff,	)	
	)	
- vs -	)	
	)	
RICHARD KLEINDIENST, Attorney General of the United States of America (formerly Richard Kleindienst), and JOHN E. INGERSOLL, Director of the Bureau of Narcotics and Dangerous Drugs, an Agency of the Department of Justice of the United States of America.	)	CIVIL ACTION NO. C-4549
	)	
Defendants.	)	

Blewitt, Bisbee and Geil, by John H. Bisbee, Attorney at law, Boulder, Colorado, Attorneys for Plaintiff; James L. Treece, United States Attorney, and Pepe J. Mendez, Special Assistant United States Attorney, Denver, Colorado, Attorneys for Denfendant.

MEMORANDUM OPINION

WINNER, Judge

This is an action for temporary injunction, declaratory

judgment, permanent injunction and damages. Plaintiff has alleged jurisdiction pursuant to the provisions of 28 U.S.C. § 1343(4); 28 U.S.C. § 1346(a)(2); United States Constitution, Article I, Sec. 9, Cl. 3; United States Constitution, Amendments Five and Eight; 28 U.S.C. § 2201; Rules 57 and 65 F.R.C.P. The Court notes jurisdiction under 28 U.S.C. § 1346(a)(2). A three-judge court was convened, a hearing held and the panel dissolved for want of a substantial federal question. The case is now ready for the disposition of the various pending motions.

Considering this case in the light most favorable to the plaintiff, we accept the facts stated in his Second Amended Complaint as supplemented by his Memorandum in Response. On or about the 6th day of April, 1972, the plaintiff, Bramble was arrested by law enforcement officials of the State of Colorado and the City of Boulder, and charged pursuant to the narcotics laws of the State of Colorado with possessing for sale a certain narcotic drug, namely marijuana. On the date of his arrest, agents of the defendant Attorney General, and of the defendant, Director of the Bureau of Narcotics and Dangerous Drugs, seized a certain 1969 Volkswagen automobile, Motor Number 45760000, Serial Number 119757754, said 1969 Volkswagen automobile had been used in violation of 21 U.S.C. § 881. On or about July 1, 1972, approximately three months after the state arrest, the plaintiff was arrested pursuant to a federal indictment charging him with illegal importation of marijuana and possession with intent to distribute marijuana. At that time, the plaintiff's car had been in federal custody approximately three months. Subsequently the charge of illegal importation was dismissed by the United States Attorney in consideration for the plaintiff's pleading guilty to possession of marijuana. The federal charges were not connected with the state charges which led to the forfeiture of the plaintiff's automobile.

The District Attorney in and for the Twentieth Judicial District of the State of Colorado deferred the plaintiff's

prosecution for a period of one year running to August 17, 1973. If the plaintiff successfully completes the one year probationary period, the state's charges will be dismissed.

Subsequent to the seizure of the above described 1969 Volkswagen, the plaintiff petitioned the defendant, Attorney General of the United States, through his appointed agent, the Director of the Bureau of Narcotics and Dangerous Drugs for remission and mitigation of the forfeiture perfected pursuant to 21 U.S.C. § 881(b)(4), but that petition was denied as was a subsequent petition for reconsideration. Therefore, the plaintiff alleges that he has exhausted all his administrative remedies as prescribed by 21 C.F.R. §§ 316.71 through 316.81, and 29 C.F.R. §§ 9.1 through 9.7. Plaintiff claims three constitutional infirmaties: a taking without just compensation in violation of the Fifth Amendment; cruel and unusual punishment in violation of the Fifth Amendment; and a Bill of Attainder in violation of Article I, Sec. 9, Clause 3 of the United States Constitution.

The defendants have submitted several motions supported by a single combined memorandum. The pertinent motions are the motion to dismiss and the motion for summary judgment. Basically, the issues presented are whether the plaintiff has failed to exhaust his administrative remedies and whether the Court has jurisdiction. In addition, the motion raises the question concerning the plaintiff's right to avail himself of his constitutional privilege against self-incrimination while prosecuting this lawsuit.

The crux of this action is the forfeiture of the plaintiff's automobile, and all arguments alleging violations of his constitutional rights ground on this same rock. The operation of this law may be harsh. For this reason forfeitures are not favored: they should be enforced only when within both the letter and the spirit of the law. *Farmer's & M. National Bank of Dearing*, 91 U.S. 29, 33-35; *United States* v. *One Ford Coach*, 307, U.S. 219, 226 (1938). To say that forfeitures are not favored is not to say that they are not valid. On the contrary, forfeitures have quite an historical back-

ground. "It is well established in American jurisprudence,[1] however, that absent a contrary legislative expression[2] personal property may be seized and statutorily forfeited without payment of any compensation even though its owner may not have engaged in any conduct which may be characterized criminal or wilfully negligent. *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581, 51 S. Ct. 282, 75 L. Ed. 558 (1931); *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 47 S. Ct. 154, 71 L. Ed. 279 (1926); *Goldsmith Jr.-Grant Co.* v. *United States*, 254 U.S.

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[1]"For a summary of civil forfeiture under the laws of the Germanic tribes, Rome, Greece and England, see Oliver W. Holmes, The Common Law ed. Mark DeWolfe Howe (Cambridge, Mass. 1963) at 2-12.

"In England, common law forfeiture resulted from a conviction and judgment for treason, misprison of treason, praemunire, drawing a weapon on a judge, papish recusancy and in many cases a felony. Lands were forfeited at attainder but transfer of the title related back to the time of the offense thereby defeating intermediate purchasers. Chattels and goods were forfeited at the time of conviction and there was no relation back to the time of the offense. Sir William Blackstone, Commentaries on the Laws of England, ed. Thomas M. Cooley, 4th Ed. James DeWitt Andrews (Chicago, 1899), b.ii at 267, 421; b.iv at 381, 387. See Thomas Mitchell, The Development of the Law of Forfeiture in the United States (New Haven, 1969). This common law doctrine, however, was not cognizable "on the revenue side of the exchequer." The Palmyra, 12 Wheaton (& US) 1 (1827).

In Japan, under some circumstances an innocent owner or purchaser of forfeitable goods is given a judicial remedy, Japanese Customs Law (Law #61 of 4/2/54), Article 118 (1), rather than the nonjudicially reviewable administrative remedy given to an innocent owner or purchaser in the United States, 19 U.S.C. § 1618 (1964), United States v. One 1961 Cadillac, 337 F. 2d 730 (6th Cir. 1964). See Mitchell, supra, at 13-14."

[2]"For example, in order to work a forfeiture under certain statutes relating to the preservation of game, the owner of the seized goods must be criminally convicted of violating certain provisions of the Conservation Code, 16 U.S.C. § 171 (1964). Also see 49 U.S.C. § 782 (1964) which protects certain innocent owners from statutory forfeitures of their motor vehicles. A similar section, § 204(b), of the Liquor Law Repeal and Enforcement Act of 1935 provides for judicially supervised remission of forfeitures where the claimant acted in good faith and there is no showing of wilful negligence. Also as noted above, Congress created a discretionary administrative power to remit forfeitures, 26 U.S.C. § 7327, 19 U.S.C. § 1618 (1964). The exercise of the adminisrator's discretion, however, is not subject to judicial review. United States v. One 1961 Cadillac, 337 F. 2d 730 (6th Cir. 1964)."

505, 41 S. Ct. 189, 65 L. Ed. 376 (1921); *Dobbin's Distillery* v. *United States*, 96 U.S. 395, 24 L. Ed. 637 (1877); *Henderson's Distilled Spirits*, 14 Wallace (81 U.S.) 44, 20 L. Ed. 815 (1871); *Palmyra*, 12 Wheat. (25 U.S.) 1, 6 L. Ed. 531 (1827);" *McKeehan* v. *United States*, 438 F. 2d 739, 742 (6th Cir. 1971).

The Sixth Circuit Court of Appeals cited the above rule then went on to note four features in the *McKeehan* case which distinguished it from the above cited precedents. The grounds included inadequacy of notice, lawfulness of purpose of possession, the lack of any declared legislative policy that forfeiture would aid in enforcing the criminal laws or make the instrumentalities of crime more difficult or costly to obtain, and the lack of any sound administrative or revenue purpose. The Court specifically premised its conclusion on the above stated features saying: "Based on these facts, we find the imposition of forfeiture on the Appellant is penal and causes an unconstitutional deprivation of personal property 'without just compensation.' Fifth Amendment, United States Constitution." The *McKeehan* decision was closely followed chronologically by a United States Supreme Court decision entitled *United States* v. *U. S. Coin & Currency*, 401 U.S. 715 (1971). Mr Justice Harlan writing for the majority said:

> ". . . we would first have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be 'deprived of . . . property, without due proces of law; nor shall private property be taken for public use, without just compensation.' Even Blackstone, who is not known as a biting critic of the English legal tradition condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism. And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. See, e.g., Goldsmith-Grant Co.

v. United States, supra. Cf. United States v. One Ford Coach, 307 U.S. 219, 236-237 (1939).

". . . the broad language of § 7302 [21 U.S.C.] cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the 'forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . .' 19 U.S.C. § 1618. Upon this showing, the Secretary is authorized to return the seized property 'upon such terms and conditions as he deems reasonable and just.' It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded. United States v. Edwards, 368 F. 2d 722 (CA4 1966); Cotonificio Bustese, S.A. v. Morgenthau, 75 App. D.C. 13, 121 F. 2d 884 (1941) (Rutledge, J.). When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. 720-722 (Footnotes omitted).

Both *McKeehan, supra,* and *Coin & Currency, supra,* were discussed and analyzed in a third case, *United States v. One 1971 Ford Truck, Serial No. F25HRJ82180,* 346 F. Supp. 613 (1972), which held: "It is clear that in this case the statute is imposing a penalty upon an innocent individual in no way 'involved in a criminal enterprise,' and is depriving him of his personal property without just compensation." The Court also found that the vehicle used for the illegal purpose was unlawfully possessed at the time of the offense for which it was forfeited, thus qualifying for an exemption from forfeiture. All of the three cases carve out an exception to the rule of valid forfeitures only as it would apply to an innocent person. Each of the cases were decided on an extraordinarily strong set of circumstances. The plaintiff in this case has not brought forward a similar set of facts.

but rather hinges his claim for relief not on guilt or innocence as much as on his deferred prosecution under C.R.S. 1963, 40-1-306. While this does not carry the weight of a conviction, it may still qualify as demonstrating the involvement in a criminal enterprise as required by the Court in *U.S. Coin & Currency, supra.*

The defendants in their supporting memorandum, paragraphs 2 through 5, allege the failure of the plaintiff to exhaust his administrative remedies as the basis for a finding of no jurisdiction in this Court. This appears to be a misapprehension of the posture of the case. The plaintiff has already filed a Petition for Remission under 19 U.S.C. § 1618[3] and a Petition for Reconsideration under that statute. Thus, the case has been carried past the initial forfeiture proceedings of 19 U.S.C. §§ 1607 and 1608. The plaintiff has exhausted his administrative remedies and therefore *P.U.C. of California* v. *United States* 355 U.S. 534 (1958) and *Reed* v. *Gardner* 261 F. Supp. 87 (D.C. Cal. 1966) are inapposite. The courts have held that "an election to proceed by petition for remission or mitigation of forfeiture rather than by claim with the requisite bond *binds the plain-*

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[3] "*19 U.S.C. § 1618. Remission or mitigation of penalties*

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition. As amended June 2, 1970, Pub. L. 91-271, Title III, § 301 (hh), 84 Stat. 291."

tiff to the available administrative remedies; and the administrative method is exclusive. See, *United States* v. *One 1961 Cadillac* (6th Cir., 1964) 337 F. 2d 730; *United States* v. *Gramling* (5th Cir., 1950) 180 F. 2d 498; *United States* v.*Chicelli* (W.D. N.Y. 1935), 10 F. Supp. 900;" *Jary Leasing Corporation* v. *United States* (E.D. N.Y. 1966) 254 F. Supp. 157, 159. [Emphasis added]

After the plaintiff elects the administrative remedy, the law is clear that he is foreclosed from the District Courts. The well reasoned and often cited opinion of Sixth Circuit Chief Judge Weick in United States v. One 1961 Carillac, 337 F. 2d 730, 732, 733 (1964) is comprehensive of the issue of jurisdiction and for that reason is set out below at some length.

> "Since the passage of the Administrative Procedure Act they (Federal Courts) have continued to hold that the exercise of discretion by the Secretary of the Treasury or of the Attorney General in denying a petition for remission of forfeiture, is not reviewable. Associates Investment Co. v. United States, 220 F. 2d 885, (C.A. 5, 1955); United States v. Gramling, 180 F. 2d 498 (C.A. 5, 1950); United States v. One 1957 Buick Roadmaster, supra; United States v. One 1951 Cadillac Coupe DeVille, 108 F. Supp. 286 (W.D. Pa. 1952); United States v. One 1946 Plymouth Sedan, 73 F. Supp. 88 (E.D. N.Y. 1946). . .
>
> "The only remedy available to an owner or lienholder of a vehicle which has been forfeited . . . is to apply for remission or mitigation of the forefeiture. Statutory provisions for remission of forfeiture are not of recent origin. They are contained in customs laws as far back as 1790. (1 Stat. 122). The Act of March 3, 1797 (1 Stat. 506) superseded the 1790 statute and provided that the Secretary had the power of remission. Remission provisions were contained in various amendments to the statute and are a part of the present law.
>
> "The purpose of the remission statutes was to grant executive power to relieve against the harshness of for-

feitures. The exercise of the power, however, was committed to the discretion of the executive so that he could temper justice with mercy or leniency. Remitting the forfeiture, however, constituted an act of grace. The courts have not been granted jurisdiction to control the action of the executive, even where it is alleged, as here, in general conclusory language, that discretion has been abused.

"It [Defendant] urges that we should construe the Administrative Procedure Act so as to furnish reviews of orders of the Attorney General denying remission of forfeiture. The trouble here is that the Administrative Procedure Act expressly exempted matters committed to the discretion of an agency. We have no right to disregard this plain language."

In fact, it has been held that the District Court does not have jurisdiction under the Administrative Procedure Act (5 U.S.C. § 1009) to review the decision of the Attorney General on a petition for remission or mitigation of a narcotics forfeiture, it being a matter "by law committed to agency discretion." *United States* v. *One 1957 Buick Roadmaster* (D.C. Mich. 1958) 167 F. Supp. 397; *United States* v. *One 1961 Cadillac Hardtop Automobile*, 207 F. Supp. 693, 700 (E.D. Tenn. S.D. 1962). "Until 1935, the District Court was without power to remit forfeitures in any case. In that year, Congress passed 18 U.S.C. § 646, 49 Stat. 878 (now 18 U.S.C. § 3617) which gave the District Court exclusive jurisdiction to remit or mitigate the forfeiture of vehicles used in transporting liquor in violation of the Internal Revenue laws. However, the Court's power was limited exclusively to liquor violation, . . . the power to remit all other forfeitures for violation of revenue laws was vested exclusively in the Secretary of the Treasury." *United States* v. *One 1941 Plymouth Tudor Sedan*, (10th Cir.) 153 F. 2d 19, 20; *United States* v. *One 1958 Pontiac Coupe* (7th Cir. 1962) 298 F. 2d 421, 423. This long standing judge-made rule that the Attorney General has unreviewable discretion over

petitions under 18 U.S.C. § 1618 is reaffirmed in *United States* v. *One 1970 Buick Riviera, Ser.* 494870H 910774 (5th Cir. 1972), 463 F. 2d 1168. In this case, the Court went on to hold:

> "Judicial control of the Attorney General's remission and mitigation function has been exercised only when administrative officials have refused to entertain a mitigation claim on the erroneous belief that they had no statutory authority to do so, Contonificio Bustese, S.A. v. Morgenthau, 74 U.S. App. D.C. 13, 121 F. 2d 884 (1941), and the extent of judicial control has been merely to require the officials to exercise jurisdiction over the claim, not to review the official decision of the merits." Id at 1170.

The court went on to observe in a footnote:

> "Although we recognize that agency action is unreviewable only in the exceptional case, *see, generally*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136, 149-150 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 139-142, 87 S. Ct. 1507, 18 L. Ed. 2d 681, 686-689 (1967), we do not write upon a clean slate. We find no instance where the Attorney General's discretion was subjected to judicial review; the full weight of authority lies on the other side." Id at 1171, fn 4.

In his Memoranda in Response the plaintiff characterizes his claim as "asking the Court to determine a substantive and important matter of Fifth Amendment law . . . most significantly . . . to resolve the issue squarely posed by the Supreme Court of the United States in *United States* v. *U.S. Coin & Currency*," *supra*. However, a full reading of that case forecloses the argument of the plaintiff. Mr. Justice Harlan said the constitutional difficulty was with the broad scope, but then went on to say in the succeeding paragraph that the broad language could not be "understood without considering the terms of the other statutes which regulate forfeiture proceedings." *U.S. Coin & Currency, supra*. There has been

no showing of compliance with the provisions of the second paragraph we have quoted above from *U.S. Coin & Currency*. The cases relied upon by plaintiff are premised on the compelling innocence of the owner involved. In the case at hand, the plaintiff does not claim complete innocence. He freely admits that there was probable cause for the forfeiture of the car because of its drug involvement. In addition to this admission, he concedes that there was criminal involvement on his part. Plaintiff makes a sweeping attack on the constitutionality of the statute and has little or no interest in the Volkswagen, and he has made no showing of clearly apparent necessity for equitable relief. See, *General Motors Corp.* v. *Burns*, 316 F. Supp. 803 (D.C. Hawaii, 1970). The Court is not dealing with a new and untested statute as has been amply demonstrated by the cases cited above. The plaintiff's allegations must be viewed in light of the lengthy history of the statute, which covers close to two centuries. As we have mentioned before, this is a harsh statute. However, there are not only statutory grounds for relief, but, also, exemptions carved out by case law. Plaintiff has qualified for neither statutory nor judge-made relief, and he rests his case on a claim that the statute is totally unconstitutional. His argument is foreclosed by the very case. *U.S. Coin & Currency*, upon which he relies. This alone, would be sufficient grounds for dismissal even without the second and separate grounds mentioned below.

Plaintiff claims a right to invoke his Fifth Amendment privilege in the course of discovery in this case, and to refuse to answer questions on deposition. His right to do so is the subject of an ALR annotation "Dismissing Action or Striking Testimony Where Party to Civil Action Asserts Privilege Against Self Incrimination as to Pertinent Question," 4 A.L.R. 3d 545 et seq. There are relatively few cases on the precise point, perhaps because of the narrow focus of the issue. Discarding state divorce cases which constitute most of the reported decisions in the area, we find four cases in point. Chronologically, *Independent Produc-*

tions Corporation v. *Loew's, Inc.*, 22 F.R.D. 266 (S.D. N.Y. 1958) was the earliest case involving the assertion of Fifth Amendment privileges by plaintiff. The case was a private treble damage antitrust action by two corporate plaintiffs and the president of one plaintiff claimed the privilege. The Court held:

> "It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.
> "Plain justice dictates the view that, regardless of plaintiff's intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action. Moore, Federal Rules and Official Forms, 164 (1956).
>
> .....
>
> "This view strikes home. Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not be denied a possible defense because plaintiffs seek to invoke an alleged privilege." Id 276, 277.

The sword and shield metaphor was further developed in an opinion by Chief Justice Desmond and six other Justices of the New York Court of Appeals. The refinement was:

> "The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt to obtain information relevant to the cause of action alleged, and possible defenses thereto. (See, also, Franklin v. Franklin, 365 Mo. 442, 283 S.W. 2d 483; Hazlett v. Bullis, 12 A.D. 2d 784, 209 N.Y.S. 2d 601 [2 Dept 1961]);" *Laverne v. Incorp.*

Village of Laurel Hollow, 18 N.Y. 2d 635, 219 N.E. 2d 397 (1966).

The District Court for the Western District of Wisconsin had the same issue before it in a civil action on a fire insurance policy wherein the insuror alleged arson by the insured as an affirmative defense. This court also verbalized its opinion in terms of the shield and sword metaphor holding:

> "Plaintiff's next contention is that the privilege against self-incrimination justifies Kisting's refusal to answer the questions involved. Plaintiffs thus seek to utilize the privilege not only as a shield, but also as a sword. This they cannot do. A plaintiff in a civil action who exercises his privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion. See Stockham v. Stockham, 168 So. 2d 320, 4 A.L.R. 3d 539 (Fla. 1964); Lund v. Lund, 161 So. 2d 873 (Fla. App. 1964); Lavine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S. 2d 574 (S. Ct., Kings Co. 1958); aff'd 7 A.D. 2d 995, 183 N.Y.S. 2d 868 (2d Dept.), Aff'd 6 N.Y. 2d 892, 190 N.Y.S. 2d 702, 160 N.E. 2d 921 (1959); Franklin v. Franklin, 365 Mo. 442, 283 S.W. 2d 483 (1955); Ann. 4 A.L.R. 3d 545. Cf. Zaczek v. Zaczek, 20 A.D. 2d 902, 249 N.Y.S. 2d 490 (2d Dept 1964):" *Kisting v. Westchester Fire Insurance Co.*, 290 F. Supp. 141, 149 (1968).

The most recent and most similar case of the four cases mentioned above was *Lyons* v. *Johnson*, 415 F. 2d 540 (9th Cir. 1969). Although that case may be distinguished from the case at hand on its fact situation (the plaintiff in *Lyons, supra*, refused to cooperate in any manner) the legal reasoning is both sound and applicable.

> "The naked question therefore simply was whether a plaintiff can refuse to submit to any discovery whatsoever upon his lawsuit, by asserting a Fifth Amendment privilege against any interrogation of him, and then demand that he nevertheless be permitted to continue with the legal pursuit of his claim, no matter what pre-

judice or possible unequal protection there might be involved to the defendant from such a court acquiescence. . . .

"Her obtaining of this shield, however, could not provide a sword to her for achieving assertion of her claims against the defendants without having to confrom to the processes necessary to orderly and equal forensic functioning. Clearly, the process of discovery has become increasingly recognized as one of the primary and essential elements in making federal court business flow and in contributing to the accomplishing of trial justice or settlement termination of litigation. The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim. If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who made the election to create an imbalance in the pans of the scales." Id 541, 542.

The authorities cited by the plaintiff in his memorandum neednot be discussed at length because they concern the rights of a criminal defendant only and the issue in the case at bar concerns a plaintiff in a civil action. The four decisions analyzed above lead to the primary conclusion that sanctions should be imposed against the plaintiff, and we conclude that dismissal is the appropriate sanction. For this additional reason, as well as for the reasons already discussed, we refuse to depart from the long line of cases upholding the constitutionality of this forfeiture statute, and we order that plaintiff's complaint and the action be dismissed.

Dated at Denver, Colorado, this 2nd day of April, 1973.

FRED M. WINNER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil I Action No. C-4549

ARTHUR T. BRAMBLE,

Petitioner,

- vs -

RICHARD KLEINDIENST, Attorney General of the United States of America; and JOHN E. INGERSOLL, Director of the Bureau of Narcotics and Dangerous Drugs, an Agency of the Department of Justice of the United States of America,

Respondents.

Blewitt, Bisbee and Geil, by John H. Bisbee, Attorney at Law, Boulder, Colorado, Attorneys for Plaintiff; James L. Treece, United States Attorney, and Pepe J. Mendez, Special Assistant United States Attorney, Denver, Colorado, for Defendants.

Before DOYLE, Circuit Judge; WINNER and FINESILVER, District Judges.

In his complaint plantiff seeks a declaratory judgment that the statutory scheme here involved[1], authorizes summary seizure of property used in violation of the law and under which his automobile was seized, is unconstitutional on its face. He further seeks injunctive relief. The sole issue which the plaintiff argued at the trial was the constitutionality of the statute on its face.

On the motion of plaintiff, a three-judge court was convened pursuant to 28 U.S.C. § 2284. A hearing has been held, and the three-judge panel is of the opinion that the federal question here posed as a basis for the three-judge court is insubstantial; that the case is not properly cognizable by a three-judge court; and that the three-judge panel should be dissolved and the matter referred to Judge Winner, the District Judge to whom the case was first assigned for disposition.

On April 6, 1972, the plaintiff was arrested by officers of the State of Colorado and the City of Boulder on a charge of possessing for sale a narcotic drug, marijuana. On the date of his arrest, federal agents of the Bureau of Narcotics and Dangerous Drugs seized plaintiff's 1969 Volkswagen automobile, Motor Number 45760000, Serial Number 119-757754, on the grounds that the automobile had been used

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[1]21 U.S.C. § 881(b)(4) provides in relevant part:

Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when —

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

in violation of 21 U.S.C. § 881.[2] However, plaintiff was not prosecuted. The District Attorney of the Twentieth Judicial District of the State of Colorado deferred the plaintiff's prosecution for a period of one year running to August 17, 1973. The condition is that if the plaintiff successfully completes the one year probationary period, the state's charges will be dismissed.

Under 19 U.S.C. § 1618, the plaintiff pursued a statutory remedy in an attempt to regain possession of his automobile. He petitioned the Attorney General of the United States through his appointed agent, the Director of the Bureau of Narcotics and Dangerous Drugs, for remission and mitigation of the forfeiture perfected pursuant to 21 U.S.C. § 881 (b)(4). This petition was denied as was a subsequent petition for reconsideration.

The plaintiff was relegated to his petition for remission and mitigation as a result of his bypass of other statutory remedies. 19 U.S.C. § 1607 authorizes the customs officer to initiate an administrative procedure to summarily forfeit a vehicle the value of which is less than $2,500. Plantiff's statutory remedy (which he waived) allowing him to contest the forfeiture is set forth in 19 U.S.C. § 1608:

> Any person claiming such . . . vehicle . . . may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses

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[2]Approximately three months after the state arrest, the plaintiff was arrested pursuant to a federal indictment charging him with illegal importation of marijuana and possession with intent to distribute marijuana. Subsequently, the charge of illegal importation was dismissed by the United States Attorney in consideration for the plaintiff's pleading guilty to possession. The federal charges were not connected with the state charges which led to the forfeiture of the plaintiff's automobile.

> of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States Attorney, for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

If the bond is posted, the summary forfeiture proceeding is halted. The case is then reported to the United States Attorney who is required to institute a judicial forfeiture proceeding.[3] As noted, plaintiff did not pursue this remedy which would have given him a judicial hearing. The reason that he eschewed it, according to his argument in open court, is that he did not dispute that the officers had probable cause to believe the property had been used in violation of the federal narcotics laws. Thus, he argues that the only avenue open to him was the present broadside attack on the constitutionality of the statute itself. We disagree with this analysis because the general rule is that an acquittal in the criminal case that is the basis for the forfeiture bars the forfeiture, and

> it has been held that the same effect follows even though there was no formal acquittal, where the criminal prosecution upon some issue essential to the entry of a judgment of forfeiture. However, although a claimant escaped without a conviction in a prior criminal proceeding involving the same transaction involved in the forfeiture proceeding, the latter action will not be

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[3]As was stated in United States v. Eight Bales #S.I.J.K., 227 F. Supp. 425, 527 (S.D.N.Y. 1964):

> The summary method of forfeiture allowed by Title 19 U.S.C. § 1607 is designed to obviate the expense and delay of condemning goods of small value. Conway v. Stannard, 17 Wall. 398, 84 U.S. 398, 21 L.Ed. 649 (1873). Instead of referring the matter to the United States Attorney for a plenary proceeding as in admiralty for condemnation, the collector is empowered to summarily dispose of the goods by sale after publication of notice of the seizure thereof. However, if a claim is filed and bond for costs given, the summary procedure is automatically stopped and the matter referred to the United States Attorney for condemnation in the usual manner.

barred if the criminal trial did not place the claimant in jeopardy, nor amount to a decision upon the essential issues in forfeiture.

36 Am. Jur. 2d, Forfeitures and Penalties § 34. United States v. U.S. Coin & Currency, 401 U.S. 715 (1971), United States v. Edwards, 368 F. 2d 722 (4th Cir. 1966), and United States v. One Ford Fairlane Tudor Sedan, Motor No. M6ET100140, 272 F. 2d. 704 (10th Cir. 1959) are to the same effect. In the case at bar it is a least arguable that a deferred prosecution is to be equated with an acquittal in legal effect. Therefore, plaintiff could have pursued the statutory remedy, and had he done so he could have advanced a tenable legal argument for voiding the forfeiture.

The Supreme Court in United State v. U.S. Coin & Currency, *supra*, has also recognized that the forfeiture procedure is dependent on conviction in the criminal case. Furthermore, the Supreme Court in *U.S. Coin & Currency* has upheld the general validity of the statute.

In view then of the fact that the statutes are valid and that there does not exist even a fighting issue as to their invalidity on their face, we conclude that the convening of the three-judge court was improper and that the cause is properly to be determined by a one-judge court. It is therefore ORDERED that the case be submitted to Judge Winner for further proceedings.

DATED at Denver, Colorado, this 29th day of March, 1973.

WILLIAM E. DOYLE
United States Circuit Judge

FRED M. WINNER
United States District Judge
SHERMAN G. FINESILVER

APPENDIX D

UNITED STATES CONSTITUTION, AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 881. FORFEITURES— PROPERTY SUBJECT

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of the subchapter.

SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

(b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when —

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

CUSTODY OF ATTORNEY GENERAL

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subchapter, the Attorney General may —

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law.

OTHER LAWS AND PROCEEDINGS APPLICABLE

(d) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property

for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer of any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other person as may be authorized for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

DISPOSITION OF FORFEITED PROPERTY

(e) Whenever property is forfeited under this subchapter the Attorney General may —

(1) retain the property for official use:

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs;

(3) require that the General Services Adminisration take custody of the property and remove it for disposition in accordance with law; or

(4) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

FORFEITURE OF SCHEDULE I SUBSTANCES

(f) All controlled substances in schedule I that are possessed, transfered, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

PLANTS

(g) (1) All species of plants from which controlled substances in schedules I and II may be derived wich have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or precises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry of, or destroy such plants.

Pub.L. 91-513, Title II, § 511, Oct. 27, 1970, 84 State. 1276.

19 U.S.C. § 1608. SAME; CLAIMS; JUDICIAL CONDEMNATION

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest there-

in. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250.00, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with aduplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, whe shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1615. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: PROVIDED, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occured.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or

discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

COLORADO REV. STAT. (1963) 39-7-401(3)

(3) Upon consenting to a deferred prosecution as provided in this section, the defendant shall execute a written waiver of his right to a speedy trial. Consent to a deferred prosecution under this section shall not be construed as an admission of guilt, nor shall such consent be admitted in evidence in a trial for the offense for which he is charged.

APPENDIX E

IN THE COUNTY COURT
IN AND FOR THE COUNTY OF BOULDER
STATE OF COLORADO

Criminal Action No. CF-1359

THE PEOPLE OF THE STATE OF COLORADO,	)	
- vs -	)	ORDER FOR DEFERRED PROSECUTION
ARTHUR TOM BRAMBLE,	)	
Defendant.	)	

THIS MATTER coming on to be heard this 16th day of August, upon Motion for Deferred Prosecution presented by both The People and the Defendant above-named, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Defendant, Arthur Tom Bramble, be, and he is hereby, granted a deferred prosecution of the charges that form the basis of the above-captioned mater until August 17, 1973.

DONE AND SIGNED IN OPEN COURT THIS 19th DAY OF SEPTEMBER, 1972.

BY THE COURT:
WILLIAM W. GARDNER
Judge

APPENDIX F

IN THE COUNTY COURT
IN AND FOR THE COUNTY OF BOULDER
STATE OF COLORADO

Criminal Action No. CF-1359

THE PEOPLE OF THE STATE OF COLORADO,	)	
- vs -	)	ORDER OF DISMISSAL
ARTHUR TOM BRAMBLE,	)	
Defendant.	)	

THIS MATTER, coming on before the Court on the Motion of the People of the State of Colorado to dismiss the above-entitled prosecution, and the Defendant having no objection to said Motion, it is.

HEREBY ORDERED, that the charges against the above-named Defendant be and hereby are dismissed with rejudice.

DONE IN OPEN COURT this 25th day of September, 1973, *nunc pro tunc* August 24, 1973.

BY THE COURT:
WILLIAM W. GARDNER
Judge